

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-1389

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 77-1389

UNITED STATES OF AMERICA,
Appellee,
—against—
ALFRED FAYER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

MARTIN, OBERMAIER & MORVILLO
Attorneys for Defendant-Appellant
Alfred Fayer
1290 Avenue of the Americas
New York, New York 10019
(212) 489-1500

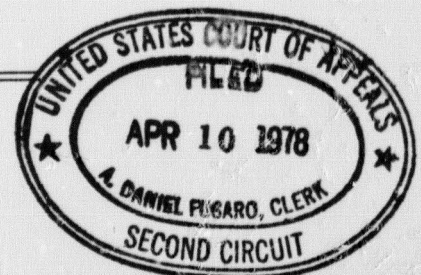


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This Court Either Overlooked or Misapprehended Appellant's Arguments for Reversal of Count IV When It Stated That He Had Failed to Raise the Doctrine of Collateral Estoppel With Respect to That Count.....	2
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UNITED STATES OF AMERICA,

Appellee,

- against -

ALFRED FAYER,

Defendant-Appellant.

PETITION FOR REHEARING

Statement of the Case

Defendant-appellant Alfred Fayer respectfully petitions this Court pursuant to Fed.R.App.P. 40(a) for a rehearing of its Decision and Opinion of March 27, 1978, affirming a judgment of conviction entered in the United States District Court for the Eastern District of New York.

Ground for Rehearing

This Court either overlooked or misapprehended appellant's arguments for reversal of Count IV when it stated in its Opinion that he failed to raise the doctrine of collateral estoppel with respect to that Count.

A R G U M E N T.

This Court Either Overlooked
or Misapprehended Appellant's
Arguments for Reversal of
Count IV When It Stated That
He Had Failed to Raise the
Doctrine of Collateral Estoppel
With Respect to That Count

At page 2113 of its slip opinion in this matter, this Court erroneously stated that appellant had only raised the doctrine of collateral estoppel on appeal with respect to the first three Counts of the four Count indictment. It then proceeded to discuss that issue only as to those Counts, and excluded Count IV from that discussion.

Contrary to the Court's statement, appellant did specifically and explicitly raise the issue of collateral estoppel with respect to Count IV as well. See pp. 26-29 of Appellant's Brief. We argued that since Judge Weinstein, in acquitting Mr. Fayer, rejected the argument relied upon by the prosecution with respect to Count IV that the statement "Please stay out of it, please" was made to Mr. Goodwin, the Government was collaterally estopped from prosecuting him on Count IV. We further argued that trial counsel's exclusion of Count IV from that part of his motion for a judgment of acquittal which dealt with the issue of collateral estoppel should not prevent this Court from reaching the merits with respect to that Count. (Appellant's Brief, at 28).

Thus, the Court's statement in its Opinion that appellant had failed to raise the issue of collateral estoppel with respect to Count IV on appeal was factually incorrect.

In light of the undeniable fact that appellant did indeed raise in his brief on appeal the issue of collateral estoppel with respect to Count IV, the only plausible explanation for this Court's failure to rule on that portion of the appeal was a sub silentio finding of waiver. Support for such speculation is found in the Court's reference in its Opinion (slip opinion 2114) to trial counsel's exclusion of Count IV from that part of his motion for a judgment of acquittal which dealt with collateral estoppel.

However, although the prosecution argued the issue of collateral estoppel was waived in its entirety, (Gov't. Brief pp. 41-42) the Court apparently rejected this contention and proceeded to deal with the merits at least with respect to Counts I, II and III. If our speculation is correct and the Court did indeed find waiver with respect to Count IV, it should state so expressly. Since appellant did in fact raise the collateral estoppel issue with respect to all Counts, including Count IV, he is entitled to a ruling on that issue with respect to the entire judgment of conviction.

Accordingly, it is respectfully submitted that the Court should grant the within petition and amend and supplement its Opinion of March 27, 1978 by ruling on appellant's collateral estoppel argument with respect to Count IV.

CONCLUSION

For all the foregoing reasons, the within Petition should be granted and this Court's Opinion of March 27, 1978 should be amended and supplemented to include either a ruling on the merits of appellant's collateral estoppel claim with regard to Count IV or a finding of waiver with respect to said claim.

Respectfully submitted,

MARTIN, OBERMAIER & MORVILLO
Attorneys for
Defendant-Appellant
ALFRED FAYER
1290 Avenue of the Americas
New York, New York 10019
Telephone (212) 489 - 1500

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

APPELLEE,

against

ALFRED FAYER,

Defendant-Appellant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes
and says that he is over the age of 18 years. That on the 10th
day of April, 1978, he served two copies of the
Petition for Rehearing on
Hon. David G. Trager, United States Attorney

the attorney for the Appellee
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney at
No. 225 Cadman Plaza East, Brooklyn () N. Y.,
that being the address designated by him for that purpose upon
the preceding papers in this action.

David F. Wilson

Sworn to before me this

10th day of April, 1978.

Courtney K. Brown

Notary Public, State of New York
Qualified in New York County
Commission Expires March 30, 1980